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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

NO. 64

CLYDE HYSLER,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Supreme Court of Florida from which this Writ of Certiorari was granted is reported as *Hysler* vs. *State of Florida*, 1 So. Rep. 2d Series 628, (not yet published in official Florida Reports). This opinion also appears in the record before this Court at page 31. Other opinions of the Supreme Court of Florida in related cases are: *Hysler* vs. *State*, 187 So. 261, 136 Fla. 563; *Hysler* vs. *State*, 181 So. 354, 132 Fla. 209; *Hysler* vs. *State*, 181 So. 350, 132 Fla. 200; *Baker* vs. *State*, 188 So. 634, 137 Fla. 27.

Jurisdiction

The Supreme Court of the United States granted certiorari in this case on June 2, 1941 (R. 32).

Summary of Argument

1. The Writ of Error Coram Nobis will not lie to relieve one of a judgment of conviction because of false or perjured testimony given at the trial by an important witness

2. The application, and exhibits thereto, filed in the Supreme Court of Florida by the Petitioner for leave to apply for a Writ of Error Coram Nobis, failed to affirmatively show any denial to him by the State of Florida of the equal protection of law guaranteed under the Fourteenth Amendment of the Constitution of the United States.

3. The application, and exhibits thereto, filed in the Supreme Court of Florida by the Petitioner for leave to apply for a Writ of Error Coram Nobis, failed to affirmatively show any denial to him by the State of Florida of the due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT

The Writ of Error Coram Nobis will not lie to relieve one of a judgment of conviction because of false or perjured testimony given at the trial by an important witness.

On April 10, 1941, the Petitioner filed in the Supreme Court of Florida his application for permission to apply to the Circuit Court of Duval County, Florida, for a Writ of Error Coram Nobis, addressed to the judgment of con-

viction entered against him in said Court on April 23, 1937, whereby he was adjudged guilty of murder in the first degree and sentenced to be electrocuted (R. 1).

The Petition charges that the testimony given by petitioner's co-defendant, James Baker, a witness for the State of Florida, was false and that petitioner's conviction was based primarily upon such false testimony.

The Supreme Court of Florida denied petitioner's application (R. 31), and this Court granted Certiorari (R. 32).

Among other things the Supreme Court of Florida held in its order denying petitioner's application, that the Writ of Error Coram Nobis would not lie because of false testimony given at the trial by an important witness.

The Writ of Error Coram Nobis is a common law writ and is no longer in use in some jurisdictions:

> "At common law a writ of error coram vobis brought before the court certain mistakes of fact not put in issue or passed upon, such as the death of a party, coverture, infancy, error in process or mistake of the Clerk. This writ is no longer in use, but its objects are attained by motion. *Pickett* vs. *Lergerwood*, 7 Pet. 142, 147."
>
> *Wetmore* vs. *Karrick*, 205 U. S. 141, text 151.

However, this writ is still in use and recognized in the State of Florida. The Supreme Court of Florida has had occasion to set forth in a number of cases the instances in which the writ was applicable. That Court has held that the writ will not lie in a criminal case where the conviction was had upon perjured testimony:

Jones vs. *State*, 130 Fla. 645, 178 So. 404.

Skipper vs. *State*, 127 Fla. 553, 173 So. 692.

Lamb vs. *State*, 91 Fla. 396, 107 So. 535.

Lamb vs. *Harrison*, 91 Fla. 927, 108 So. 671.

Jennings vs. *Pope*, 101 Fla. 1476, 136 So. 471.

Pike vs. *State*, 103 Fla. 594, 139 So. 196.

This holding is not peculiar to the Supreme Court of Florida but is in harmony with the decisions of courts of other states of the Union:

State vs. *Asbell*, 62 Kan. 209, 61 Pac. 690.

State, ex rel., Davis vs. *Superior Court and Pierce County*, 46 Pac. 399, 15 Wash. 339.

Beard vs. *State*, 99 S. W. 837, 81 Ark. 515.

People vs. *Mooney*, 174 Pac. 325, 178 Cal. 525.

It has also been held by a number of State Courts that this writ will not lie to obtain a new trial upon assertions of newly discovered evidence:

Howard vs. *State*, 24 S. W. 8, 58 Ark. 229.

Humphreys vs. *State*, 224 P. 937, 129 Wash. 309, 33 A. L. R. 78, and notes.

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People vs. *Drysch*, 143 N. E. 100, 311 Ill. 342.

Sease vs. *State*, 247 S. W. 1036, 157 Ark. 217.

The Supreme Court of Florida has further held that the writ will not reach facts actually determined in the original proceeding:

Lamb vs. *State*, 91 Fla. 396, 107 So. 535.

Nor will it lie because the Prosecuting Attorney calls for the State one who is under agreement to be exonerated in the event of a conviction of a defendant:

Pike vs. *State*, 139 So. 196, 103 Fla. 594.

It is true that the narrow scope of the writ at common law has been broadened in those states which still permit its use, and it has been held that the writ will now lie in cases where the accused, through well grounded fear of mob violence, has been forced to enter a plea of guilty to a criminal charge:

State vs. *Calhoun*, 50 Kan. 523, 32 Pac. 38, 18 L. R. A. 838.

And it has been granted where the accused was forced to enter a plea of guilty because of fear that he would be killed if he did not do so:

Nickels vs. *State*, 98 So. 502, 86 Fla. 208.

Nickels vs. *State*, 99 So. 121, 86 Fla. 208.

And where it is shown that the defendant was insane at the time of his conviction the writ will lie:

Hawie vs. *State*, 83 So. 158, 121 Miss. 197, 10 A. L. R. 205, and note.

Hydrick vs. *State*, 148 S. W. 541, 104 Ark. 43.

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Gibson vs. *Pollock*, 166 S. W. 874, 179 Mo. App. 188.

Adler vs. *State*, 35 Ark. 517.

Johnson vs. *State*, 133 S. W. 596, 97 Ark. 131.

It is not a writ of right but may be granted in the exercise of sound judicial discretion, and will not be granted unless it be duly shown that a fact existed at the trial that if then known to the Court would have prevented the judgment that was rendered, and in order to authorize the granting of the writ such facts must appear with reasonable certainty:

Ernst vs. *Wisconsin*, 179 Wis. 646, 192 N. W. 65, 30 A. L. R. 681, also

Lamb vs. *State*, 107 So. 535, 91 Fla. 396.

The Supreme Court of Florida in the case of *Washington* vs. *State*, 110 So. 259, 92 Fla. 740, in discussing the writ held that an Appellate Court should not grant permission to apply to a trial court for a writ of error coram nobis except upon a proper and adequate showing of essential facts duly made by competent and adequate legal evidence.

The case of *Mooney* vs. *Holohan* reported in 294 U. S. page 103, 79 L. ed. 791, seems to be very similar to the case now before this Court.

In the Mooney case a motion was filed in the Supreme Court of the United States for leave to file a petition

for an original writ of habeas corpus. The petitioner, Mooney, alleged that he was unlawfully restrained of his liberty by the State of California under a commitment pursuant to a conviction of murder in the first degree. The petition charged that the State of California held him in custody without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, in that the sole basis of his conviction was perjured testimony which was knowingly used by the prosecuting authorities in order to obtain his conviction.

As we believe the decision of this Court in the Mooney case is directly in point and that the action of the Court in that case should control in the case at bar, we take the liberty of quoting somewhat at length from the opinion of this Court in the Mooney case:

> "The decisions of the Supreme Court of California in relation to petitioner's conviction have dealt with the questions presented to that Court within the limitations of particular appellate procedure. When there was submitted to that Court the consent of the Attorney General to the reversal of the judgment against petitioner and to the granting of a new trial the Court pointed out that no motion had been made by the defendant and that his appeal was awaiting hearing. *People* vs. *Mooney*, 175 Cal. 666, 166 P. 999. When, again in advance of the hearing of his appeal, the defendant made his motion solely upon the ground of the Attorney General's consent, the Court held that its jurisdiction on appeal was limited to a determination whether there had been any error of law in the proceedings of the trial court and that the Court was confined to the record sent to it by the court below. *People* vs. *Mooney*, 176 Cal. 105, 167 P. 696. On the appeal, the Court, thus dealing

with the record before it, found that the verdict was supported by the testimony presented and that no ground appeared for reversal. *People* vs. *Mooney*, 177 Cal. 642, 171 P. 690. When, later, the defendant moved to set aside the judgment, and sought a certificate of probable cause on his appeal from an order denying his motion, the Court held that the general averments against the fairness of the trial were insufficient, but the Court did not place its denial of the application entirely upon that ground. The Court concluded that the proceeding by way of motion to set aside the judgment after it had become final and a motion for a new trial had been denied, and the time therefor had expired, was 'in the nature of an application for a writ of coram nobis, at common law.' The Court thought that such a writ did not lie to correct any error in the judgment of the Court nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself. The Court, adopting the opinion of the court below, concluded that the judgment could not be set aside because it was predicated upon perjured testimony or because material evidence was concealed or suppressed; that the fraud in such a case was not such fraud as was 'extrinsic to the record,' and that it was only in cases of extrinsic fraud that the relief sought could be had. It was apparently in relation to such an application that the Court said that the injured party was 'without remedy.' *People* vs. *Mooney*, 178 Cal. 525, 174 P. 325. And it was with respect to that proceeding that the writ of certiorari was denied by this Court. *Mooney* vs. *California*, 248 U. S. 579, 63 L. ed. 430, 39 S. Ct. 21."

The Supreme Court of California treated Mooney's motion to set aside the judgment as if it were an application for a writ of error coram nobis, and held that such writ would not lie to correct any error in the judgment

of the trial court or put in issue any fact directly passed upon by that court.

In the case at bar the petitioner alleged in his application, filed in the Supreme Court of Florida, that he was convicted on perjured testimony.

We believe, therefore, that the action of the Supreme Court of Florida in denying the application was in accord with the opinion of this Court in the Mooney case and should be affirmed on authority of that case.

The Supreme Court of Florida has fully discussed the office of this extraordinary writ in the opinions herein cited, and have fixed precise limits within which it will be allowed in Florida, and has definitely set forth the requirements that must be met before it will issue and the procedure to be followed. In the instant case that court has found and determined that those requirements have not been met.

In the case of *Chesser* vs. *State of Florida*, 109 So. 906, the Supreme Court of Florida said:

> "The above-stated rule appears to have been uniformly adhered to by the courts of England, and also by the courts of the several states of the United States, where this extraordinary writ has been held to be an available remedy in proper cases, as is held in this state. The application of the writ for the purpose of obtaining redress in those cases where it was and is intended to apply is wise and salutary, but its scope cannot be extended without grave danger of its becoming a menace to the enforcement of the law, an ever ready barrier for the obstruction of justice and the vehicle for the escape of the guilty. The courts and the lawmakers of the country should therefore carefully guard the extent of its application

and confine it to those well-fixed purposes for which it was originally intended, and beyond which the courts and lawmakers in the past have not allowed its use."

A State is and should be free to regulate the procedure of its own courts in accordance with its own conceptions of policy, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental:

Brown vs. *Mississippi*, 297 U. S. 278-287, 80 L. ed. 682.

No fundamental right of the petitioner was violated by the refusal of the Florida Court to extend the application of this discretionary writ to cases in which it was never intended to apply.

The application, and exhibits thereto, filed in the Supreme Court of Florida by the petitioner for leave to apply for a Writ of Error Coram Nobis, failed to affirmatively show any denial to him by the State of Florida of the equal protection of law guaranteed under the Fourteenth Amendment of the Constitution of the United States.

Petitioner apparently attempts to show that he has been denied the equal protection of law by the State of Florida by alleging in effect that he was convicted on testimony known by the Prosecuting Attorney to have been false. He further contends that the Supreme Court of Florida had applied a different rule in his case from the rule announced by that court in the case of *Washington* vs. *State*, 110 So. 259, 92 Fla. 740.

The purpose of the Thirteenth and Fourteenth Amendments was to elevate the colored race and place negroes on the same plane of equality with white persons so far as their civil and political rights were concerned.

The Fourteenth Amendment was adopted for the purpose of prohibiting any state from discriminating against any negro by reason of his race or color. The petitioner in this case is a white man.

We do not admit petitioner's allegation that the Supreme Court of Florida has adopted a rule in his case contrary to its previous decision. However, if this were true, it constitutes no action prohibited by the Constitution of the United States for it places petitioner in no different position than any other litigant.

The same is true as to his allegation with reference to the action of the prosecuting attorney. As was said

by the Circuit Court of Appeals for the Ninth Circuit in a case involving an alleged conspiracy brought against the Prosecuting Attorney, Deputy Prosecuting Attorney, and Judge, charging that they conspired to deprive a lawyer of his right to practice law:

> "No such purpose was involved in the alleged conspiracy in the case at bar. Appellant was subjected to no greater hazard than any other individual in the state, namely, the hazard of being prosecuted for a crime and convicted by false testimony, and if the prosecuting officer of the county were sufficiently corrupt to use his high office for the purpose of convicting innocent people by perjured testimony, all the citizens within his jurisdiction would be subject to the same hazard."
>
> *Mitchell* vs. *Greenough*, 100 F. 2d 184.

Further in the same opinion the Court said:

> "The prohibition against 'denial of the equal protection of the law' was to prevent class legislation or action."
>
> *Mitchell* vs. *Greenough*, supra.

The Supreme Court of the United States in discussing the purpose of and underlying reasons for the adoption of the Fourteenth Amendment to the Constitution of the United States said:

> "This is one of a series of constitutional provisions having a common purpose, namely: securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the Amendments, as we said in the Slaughter-House cases, 16 Wall., 36, 21 L. ed., 394, cannot be understood without keeping in view

the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that, in some states, laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the 14th Amendment was framed and adopted."

Strauder vs. *West Virginia*, 25 L. ed. 664.

See also *Barbin* vs. *Connally*, 113 U. S. 27.

The equal protection amendment cannot be said to apply to petitioner's case, as it is not shown that the State of Florida has accorded him any other or different treatment than is accorded any other citizen of the State under like circumstances.

The application, and exhibits thereto, filed in the Supreme Court of Florida by the petitioner for leave to apply for a Writ of Error Coram Nobis, failed to affirmatively show any denial to him by the State of Florida of the due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States.

Petitioner further alleges in his application filed in the Supreme Court of Florida; that he has been denied due process of law, in that he was convicted on the testimony of two co-defendants, Alvin Tyler and James Baker; that their testimony was false and that they were coerced, intimidated, beaten, and threatened with violence in order to compel them to give testimony against petitioner, and further, for the reason that prosecuting attorney, in order to induce the witness James Baker to testify against the petitioner, promised the said James Baker that he would not receive the death penalty.

The application of petitioner is not self-proving, and we must, therefore, look to the affidavits attached to such application and made a part thereof, in order to determine whether the allegations of petitioner are substantiated.

The petitioner was convicted in this case on April 5, 1937 (R. 1). At that trial the co-defendant James Baker testified as a witness for the State. Four years later he attempts to repudiate the testimony he gave at that trial by means of his affidavits attached to petitioner's application (R. 6 to 16 & 21).

At this point we would like to call the Court's attention to the case of U. S. ex rel., *Lesser* vs. *People of New York*, reported in 34 Fed. Sup. page 730. In this case an

application was made to the United States District Court for the Western District of New York for a writ of habeas corpus. The application was based on the ground that the conviction was based on false and perjured testimony. Various affidavits were submitted in support of the application, among them affidavits to the effect that the complainant had stated that he was forced by the police to bring the charge of kidnapping against the relator and that the relator was not guilty of the offense.

As was stated by the Court in that case:

> "Admissions of this type are to be scrutinized and weighed with great caution."

The first affidavit of James Baker (R. 6) appears to have been made at the State Prison, Raiford, Florida, between 5:00 and 6:00 o'clock P. M. on April 7, 1941. In the narrative part of this affidavit Baker states that after the killing of Mr. and Mrs. Surrency, that he and Alvin Tyler, the man who did the actual killing, agreed between them while they were in "Cracker Swamp" in Duval County, Florida, that they would lay the blame of the planning of the robbery of the Surreneys on Clyde Hysler, because they had had considerable liquor dealings with him and knew him well, and because the Hyslers bore a bad reputation in Duval County and Clyde Hysler's father had plenty of money and they thought he and his other relatives would be able to get Clyde Hysler out of the trouble, and that by doing this James Baker and Alvin Tyler would escape the death penalty.

He further states in this affidavit that Clyde Hysler was not implicated in the planning of the robbery and had nothing to do with the killing of Mr. and Mrs. Surrency, but that one, Joe Peterson, was the man who

planned the robbery and hired James Baker and Alvin Tyler to perform the robbery.

It is significant to note the phraseology used in this affidavit. Baker says that he and Tyler agreed to lay the blame of the *planning* of the robbery on Clyde Hysler for the above reasons. He further says that Clyde Hysler was not *implicated* in the *planning* of the robbery and had nothing to do with the *killing* of Mr. and Mrs. Surrency. Nowhere in this affidavit or in any of the other affidavits filed with petitioner's application does James Baker deny the truth of the *facts* testfied to by him at the trial. As the testimony given at the trial of this case has not been incorporated in the printed record, references to such testimony are to the original page numbers of the transcript on file in this Court.

Baker testified at the trial that Clyde Hysler carried him in an automobile out to the vicinity where the robbery was to take place several days prior to the murder and showed him the roads in that section and where Clyde Hysler would meet Baker and Tyler after the holdup, and that Clyde Hysler did in fact meet Baker and Tyler in that vicinity immediately after the murder of Mr. and Mrs. Surrency and carried them in his car to a swamp where they got out, Hysler advising them that he would come back for them later that day (1030-1065).

This testimony was also corroborated by the testimony of Alvin Tyler (911-927).

Baker does not in any of his affidavits attached to the petitioner's application, state that these facts as testified to by him and Alvin Tyler were not true. By reading the testimony of the witness Baker and comparing it with the affidavit which he made on April 7, 1941, (R. 6),

it will be readily seen that in this affidavit he merely substitutes the name of Joe Peterson for that of Clyde Hysler.

In this first affidavit (R. 9), it appears as follows:

"Q. You are making these statements and this affidavit of your own free will and accord without any hope or reward or fear of punishment, and without any intimidation and realizing that you are likely to die next week?"

"A. Yes, sir, but that is the truth."

"Q. Do you say that all the statements you have made in here is the truth and nothing but the truth?"

"A. Yes, sir."

Notwithstanding this statement by Baker that the truth was contained in that affidavit, it was found necessary to interview him again on the following day, April 8, 1941, at which time Baker appears to have made another statement to counsel for petitioner at the State Penitentiary between 6:00 and 7:00 o'clock P. M. In this statement James Baker, instead of narrating his story, was specifically interrogated, and in this statement appears for the first time any indication of any mistreatment of this witness by any officers.

Notwithstanding the fact that the petitioner's application (R. 5, par. 8) states that the affidavits made by Baker were made freely and voluntarily and without any *suggesting* or *prompting*, we find (R. 11), the alleged mistreatment of Baker introduced in this manner:

"Q. Now what threats or promises did they make you to testify and implicate Clyde Hysler?"

"A. Well, Mr. Griffen and them didn't, they didn't make no promises, Mr. Hulbert did talk to me, that he would get me life imprisonment—life instead of the chair."

And then Baker states that John W. Harrell, the State's Attorney, told him that he would help get him out in three years and that he, Baker, wouldn't burn. Baker then states, according to this affidavit, that the officers beat and mistreated him, and contrary to the statement made by him in the first affidavit as to his reasons for laying the blame of the murder on Clyde Hysler, he says in this second affidavit (R. 12), that he did so because he was beaten and mistreated:

"Q. And if it hadn't been for the beatings and threats and the promises to get you out of here in three years as you have stated above would you have implicated Mr. Hysler in the case at all?"

"A. No; sir, cause I told them I didn't no anything about it; and another thing, between Mr. Hysler's first trial and last one, Mr. Harrell came down to the County Jail after I was allowed to see people, I said, don't you know that if you burn Mr. Hysler you will have to burn me too, and he said he could burn the whole Hysler family and don't burn me cause he and Mr. Sidney Hulbert, Mr. Carson and Mr. Cannon and some more officers was going to run the county as long as they were running it."

Now which of these affidavits is true?

It appears that they both cannot speak the truth.

It appears that again on this same day between 8:30 and 9:00 o'clock P. M. the third affidavit was made by James Baker at the State Penitentiary at Raiford, Flor-

ida, and in this affidavit (R. 16), for the first time appears a charge of improper conduct on the part of the Prosecuting Attorney.

Baker says in this third affidavit:

"Q. Baker do you know whether or not Mr. Harrell knew if you was beat up to make you testify?"

"A. Yes, sir, he knows I couldn't set down, none of the sheriff's force knew it at the time, they knew it later when I made it in front all of the officers.

In this affidavit or statement this direct question was asked Baker:

"Q. As a matter of fact, Hysler was not mixed in it but it was Joe Peterson—?"

and Baker made no direct answer to this question but began talking about something else (R. 15).

It will be noted that in the other affidavits Baker had said that Hysler was not *implicated* in the *planning* of the robbery and had nothing to do with the *killing* of the Surrencys, and further that he was not *responsible* for the attempted robbery, but when he was asked the direct question of whether Hysler was "mixed in it" he failed to answer.

In considering these affidavits of Baker it should be borne in mind that they were made four years after the trial of petitioner in which Baker testified as a witness. They attempt to lay the blame for the killing of the Surrencys on one, Joe Peterson, a man whose lips have now been sealed by death (R. 18).

It should further be borne in mind that the witness, Alvin Tyler, who testified for the State at petitioner's

trial and who is a co-defendant, has escaped and the witness Baker knows that he is not available to contradict Baker's statements (R. 9).

The affidavits of Baker, to the petition attached, cannot be reconciled one with the other. The matters alleged in the first affidavit stand in defiance to the alleged truth of the allegations contained in the second affidavit. That portion of Baker's affidavits that is in question and answer form, reveals that his answers were in reply to direct, leading, and suggestive questions propounded to him, the form and structure of such questions being at variance with the most elementary rules of trial procedure. It is respectfully submitted, therefore, that the affidavits of Baker are not competent and adequate legal evidence of any facts.

In an effort to corroborate statements made in these affidavits by Baker, there are attached to the Petitioner's application affidavits of one Ed Mosley (R. 16), A. J. Mooney (R. 17), Ruby Crews (R. 18), Rudolph J. Dowling (R. 19), H. L. Anderson and W. J. Sears, Jr., (R. 20).

The affidavit of Ed Mosley (R. 16) attempts to corroborate the affidavits of the witness James Baker in his statement that Joe Peterson and not Clyde Hysler was implicated in the attempted robbery and murder of Mr. and Mrs. Surrency. This affidavit states that Joe Peterson told affiant about some man who went to get a bunch of Fruit Growers Express checks cashed, and in effect it would be an easy matter to rob him. Nowhere in this affidavit is it shown that the man Joe Peterson had reference to was Mr. Surrency. It is merely a general statement purporting to have been made by Joe Peterson to affiant in an endeavor to get affiant to hold up some unknown man.

There was also submitted with petitioner's application filed in the Supreme Court of Florida an affidavit of one A. J. Mooney (R. 17), in which he states that one Rudolph Dowling told him, affiant, that that negro Baker said for him, Peterson, to bring him something; that he, Baker, was keeping his mouth shut. This is evidently intended to imply that Baker was keeping his mouth shut about Peterson's supposed connection with the attempted robbery and murder of the Surrencys. However, neither in this affidavit nor in the affidavit of Rudolph Dowling (R. 19), does this positively appear to have been what Baker had in mind. It will be recalled that Baker, in his affidavit of April 7, 1941 (R. 7), stated that he had liquor dealings with Joe Peterson, and we submit that it is just as reasonable and probable to believe that Baker meant to convey to Joe Peterson his intention to keep his mouth shut concerning Peterson's liquor dealings.

There also appears in the affidavit of A. J. Mooney (R. 18), a statement purporting to have been made by Joe Peterson to the effect that he, Joe Peterson, was the cause of "all of it." No doubt this is construed by petitioner to mean that Joe Peterson stated that he was the cause of the death of Mr. and Mrs. Surrency in corroboration of the statements made by James Baker.

Ruby Crews stated in her affidavit (R. 18), that Joe Peterson had told her that he was responsible for the whole thing, speaking about the death of Mr. and Mrs. Surrency. These statements were made to her, according to her affidavit, at different times between the death of the Surrencys and Christmas 1939.

Joe Peterson was a witness for the State of Florida at the trial of the petitioner, and according to his testimony, he went into Jacksonville to a bank with Mr. Surrency on the morning of the day that Surrency was killed (617) and that he, about 9:30 or 9:45 that morning, returnd to his home with Mr. and Mrs. Surrency (627); that he remained at his home and Mr. and Mrs. Surrency left (627-628); that shortly thereafter one Wiley Prescott came to his house and said, "Come on you want to see a bad looking sight" (629), and that he, Peterson, then went down to the place where Mr. and Mrs. Surrency had been shot (631-636).

The statements purporting to have been made by Joe Peterson to affiants A. J. Mooney and Ruby Crews concerning his sense of responsibility for the death of Mr. and Mrs. Surrency may mean any one of a great number of things. He might have meant that he could have traveled home a different route from Jacksonville on that particular morning and Mr. and Mrs. Surreney would not have been killed, or he could have meant that had they made their visit to Jacksonville at a different hour of the day they might not have met these two negroes, or if they had gone to Mr. Surrency's home on their return from Jacksonville before first going by Mr. Peterson's home they might not have met these two negroes. There is certainly no direct and positive contention in any of these affidavits sufficient to impeach the positive testimony of the witnesses who testified at the trial of petitioner.

The record does not reveal whether or not the affiants Ed Mosley, A. J. Mooney, Ruby Crews, and Rudolph J. Dowling are close relatives of petitioner. It is also to be noted that neither of these affiants offer any reason

or explanation for their having remained *silent* during the passing of years and until after the death of Joe Peterson.

Petitioner also submits an affidavit of the Honorable W. J. Sears, Jr., and the Honorable H. L. Anderson, the attorneys who represented him at his trial (R. 20), whom the Supreme Court of Florida saw fit to refer to (R. 32) in its Order denying petitioner's application, as able, diligent, and faithful counsel. These attorneys state in their affidavit, that they questioned the witnesses James Baker and Alvin Tyler at great length prior to petitioner's trial. On this occasion the attorney for James Baker and the attorney for Alvin Tyler were present, and Baker and Tyler, in the presence of their attorneys and the attorneys for Clyde Hysler, denied that any one was involved in the case other than the defendants named in the indictment; they also denied that any statements previously made by them to law-enforcing officers were made under duress or with any hope or expectation of reward.

There certainly was no occasion for Baker to withhold the truth from his own attorney and if in truth he had been subjected to mistreatment, or extended any promise or hope of reward, he would have then and there made such facts known to his own counsel. It certainly could not in fact be contended that Baker was on that occasion under duress or fear.

There is nothing in the affidavit made by the Honorable W. J. Sears, Jr., and the Honorable H. L. Anderson to indicate that they did not believe and have every reason to believe the testimony given at the trial by these witnesses. It must be presumed that such able

counsel had conferred at length with their client as well as with these two witnesses. They, therefore, knew at the time of the trial whether the testimony of these two witnesses was in accord with the explanation given by the petitioner. The testimony given by these two witnesses, therefore, does not appear to have been any surprise to petitioner, and it certainly cannot be said that such testimony is newly discovered.

One of the grounds assigned by the Supreme Court of Florida as a basis for its Order denying petitioner's application was that the record of the Judgment of Conviction of the petitioner shows ample evidence to support his conviction without the aid of the testimony of the witness James Baker. Out of an abundance of precaution the Supreme Court of Florida apparently discarded from its mind all of the testimony of the witness James Baker and found ample evidence in that record to sustain petitioner's conviction.

Respondent concedes that a conviction of a criminal offense which rests solely upon a confession shown to have been extorted by officers of the State by brutality and violence is inconsistent with due process of law as required by the Fourteenth Amendment to the Constitution of the United Sates:

Brown vs. *Mississippi*, 297 U. S. 278, 80 L. ed. 682.

And that it is also inconsistent with due process for a State to contrive a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the Court and Jury by the presentation of testimony known to be perjured.

Mooney vs. *Holohan*, 294, U. S. 103, 79 L. ed. 791,

but the due process of law clause of the Fourteenth Amendment was never intended to deprive Courts generally of the power to hear and determine issues of fact and in doing so to decide which evidence is true and which evidence is false:

United States vs. *Throckmorton*, 98 U. S. 61, 25, L. ed. 93;

Springstein vs. *Sanders*, 182 Iowa, 658, 164 N. W. 622, L. R. A. 1918F, 1076;

Asbell vs. *State*, 62 Kan. 209, 61 P. 690;

Beard vs. *State*, 81 Ark. 515, 99 S. W. 837;

State ex rel., Davis vs. *Superior Ct.*, 15 Wash. 339, 46 P. 399;

Howard vs. *State*, 58 Ark. 229, 24 S. W. 8;

Mooney vs. *Holohan*, 294 U. S. 103-115, 79 L. ed. 791.

There is no question in this case of a confession extorted by officers of the State, and petitioner has fallen far short of meeting the requirements indicated by the statement of this Court in the case of *Mooney* vs. *Holohan*, supra.

The testimony given at petitioner's trial by the witnesses other than James Baker fits in and is consistent with the testimony given by him, Baker, but it is altogether inconsistent with the statements made by James Baker in the affidavits attached to the petitioner's application filed in the Supreme Court of Florida, and the statements made in the other affidavits attached to this application are entirely inconsistent with the evidence given at petitioner's trial.

In support of the findings of the Supreme Court of Florida that the evidence was amply sufficient to sustain

petitioner's conviction without the aid of the testimony of James Baker, we would like to discuss that evidence briefly at this point. As we have previously stated, references herein to testimony given at the trial of petitioner are to page numbers of the original transcript of record of the Judgment of Conviction in that case, as this testimony has not been incorporated in the printed record before this Court.

The petitioner, in his direct examination at the trial, stated that he saw James Baker on November 20, 1936, and was asked by Baker for a job hauling whiskey (1697-98); that he took a load of moonshine liquor from Jacksonville to Orlando the following Sunday night November 22, getting back early Tuesday morning, November 24, (1702); that he was due to take another load to Palatka on Wednesday, November 25, and went to town Tuesday afternoon to arrange with someone to take the load (1702-03); that he saw Baker with whom was Tyler and arranged for Baker to take the whiskey (1703-04); that he then went to Robert E. Lee High School to see Miss Newsom, a teacher, about borrowing her car (1705-06) and that night arranged with her to take it the next morning (1709-10); that Wednesday morning he met Baker and Tyler and took them to the high school where he had Tyler get Miss Newsom's car (1712); that he then had Baker drive the car with Tyler and gave him some money to get gasoline and told Baker to meet him at Lenox and Edgewood (1713); that he waited at that corner from approximately 9 o'clock to 10:30 o'clock A. M. and then drove to Bud Gardner's house (1714-15); that from then until the middle of the afternoon he was with Bud (1718-25). On cross examination he stated that while he was waiting at Lenox and Edgewood for the

negroes he saw several people, naming them (1811-12), but none of these people were put on the stand to corroborate his statement.

The testimony of Tyler, a witness for the State, was like that of the petitioner in certain parts. After being warned by the trial judge of his constitutional rights (881-83), he stated that he had known the petitioner only since November 24, 1936, (884-85, 889) at which time he was with Baker and got in petitioner's car (890-92); that petitioner said he would see them the next morning (902); that the next morning, Wednesday, November 25, the petitioner came for them and took them to the high school where he, Tyler, got Miss Newsom's car (903-04).

Except for the foregoing testimony the statements of petitioner and Tyler do not agree. Tyler stated that the petitioner took Baker and himself out Kings Road on the afternoon of November 24, discussed the proposed robbery of Mr. Surrency and showed them the different roads (894-95); that while they were driving around they met two ladies in a car at a cross road (898-99); that petitioner showed them a gun which they could use (907-08); that next morning after getting Miss Newsom's car he went in petitioner's car with petitioner and Baker followed in Miss Newsom's car out to Kings Road (910) where petitioner showed them where and how to block Mr. Surrency's car (911) and where he would wait for them (912); that petitioner then gave him the gun fully loaded (912); and that he and Baker left in Miss Newsom's car (916); that after the attempted robbery when he fired all cartridges in the gun, Baker drove the car up a dirt road which ran out and the two of them ran across a field (923) until they saw petitioner in his car and got in it (925); that they were then taken to Cracker

Swamp where petitioner left them saying he would come back at night time for them (927); that after remaining in the swamp for a while during which he left his overalls, the two of them left the swamp and went on to town (934, 939-42); that he pawned the pistol (947); and that he definitely identified the revolver in court as the one used by him and given to him by petitioner (955-57).

The testimony of James Baker, which now more than four years after the trial he attempts to repudiate in part, is substantially like that of Tyler (1027-1178).

There is a great deal of testimony to corroborate that of Tyler as to the points on which he and the petitioner did not agree. The revolver which Tyler identified in Court as the murder weapon was shown to have been owned by Joe Bird who pawned it with Ed Bazar (1260). Bazar agreed to let James H. Hysler, father of the petitioner, have it (1272). W. E. Traub, who worked for Bazar, said he turned it over to James H. Hysler (1280-81). Richard Gore, a policeman, said he had seen the revolver in Bazar's place (1287) and that later in October, 1936, he saw it in the hands of Clyde Hysler (1289-90). Girvis Stephenson confirmed the statement of Gore in that he said he was present at the time Gore stated Clyde Hysler showed a revolver but could not identify it as the one in court (1373-74). A Mrs. Bowling, who had danced and gone around with Clyde Hysler, said she saw a revolver like the one in court in Hysler's pocket two or three times in September, 1936, though she could not identify it as the revolver in court (1303-06). A fire-arms expert from the Federal Bureau of Investigation in Washington identified the bullet which had been taken from the hip of Mrs. Surrency (600, 751) as one

which had been fired from the revolver in the court room (1225) and his statement confirmed that of Tyler who testified he had fired it at the holdup.

Mrs. Elizabeth Crawford stated that she was driving the car of Mrs. Bessie Wainwright on Tuesday morning November 24, 1936, and that about 11:45 A. M. she met a car in which Hysler was riding on the front seat and a negro whom she identified as Tyler driving and another negro whom she identified as Baker sitting in the back seat; that this meeting was at the corner of West Fifth Street and Huron; that Tyler honked his horn and they waited for him to turn (1343-45). This was confirmed by Mrs. Wainwright who stated she was sitting in the front seat with Mrs. Crawford (1321-25). A workman for the Atlantic Coast Line Railroad Company, J. C. Peacock, said he saw petitioner with two negroes driving on St. Clair Street, one block from Huron Street, shortly after 11:30 A. M. Tuesday morning, November 24, 1936, (1357). He could not identify the negroes but states that one was driving the car with Hysler sitting beside him and the other was in the back seat (1359).

Miss Laura Newsom confirmed the statement of petitioner that he came on Tuesday afternoon to the high school to borrow her car (1438) and said that he had asked to borrow it only for a short while (1439-40); that when she wanted the car about 10:30 A. M. Wednesday morning it was gone and she reported it stolen (1443); that during the morning while still at school she received a note: "Report your car stolen. It is all right" (1446). Bud Gardner stated that he took the note from petitioner to Miss Newsom that morning (1599-1602) and petitioner himself admitted that he wrote such a note and sent it by Bud (1719-20), though upon cross examination he

could give no satisfactory reason why he did not tell Miss Newsom he had turned the car over to the negroes (1788-90, 1803-06).

Mrs. T. J. Baxter testified that she was driving a car in which was seated Mrs. Laura Green and Miss Barbara Atkinson on the morning of Wednesday, November 25, 1936, shortly before 10:00 A. M. when she passed the Surrency car blocked by a car used by two negroes later identified by her as Baker and Tyler (810-15); that after she had passed the two cars and stopped at Kings Road to let Miss Atkinson out she heard shooting (816); that she then drove with the two women to St. Clair Street where Miss Atkinson got out in front of the house of her grandmother (818); that while waiting for Miss Atkinson to return she saw the black negro running on St. Clair street (821) where he got in a black, new looking car which left at once (822-23). Similar testimony was given by Mrs. Green (761-809) who said that she turned in the seat at the first shot and saw the light colored negro (Tyler) still shooting (773); that when their car reached the front of the house of Miss Atkinson's grandmother she saw the black negro (Baker) running and get in a new Plymouth or Pontiac sedan which left at once (777-78); that she later identified a car at the police station as the one into which she had seen the negro get (798-99, 807-08). Miss Atkinson testified to about the same facts as Mrs. Green except that she said she did not see the negro get in the escape car because she was walking over to her mother's house (858-78).

The foregoing excerpts from the evidence given at the trial definitely show a connection of the petitioner with

the crime even without the testimony of either Tyler or Baker. There is no showing that Tyler has ever repudiated his testimony and in all points except the actual conversation when the robbery was planned he was corroborated by unimpeached witnesses.

CONCLUSION

It is significant to note that the affidavits made by James Baker in which he attempts to exonerate petitioner now more than four years after his testimony was given at the trial, were not made until after his own conviction was affirmed by the Supreme Court of Florida (*Baker* vs *State*, 188 So. 634). It appears all through his affidavits that he is fully cognizant of the fact that the only chance he has of escaping the death penalty is by some means for the petitioner, Clyde Hysler, to escape that penalty, as these affidavits show that the negro is convinced that if Clyde Hysler is electrocuted he, Baker, will also suffer the death penalty.

The conflicting affidavits upon which the petitioner's application was predicated were certainly insufficient to impeach the verity and finality of the judgment of the Circuit Court of Duval County, Florida, which was, on appeal, affirmed by the Supreme Court of the State of Florida.

We, therefore, submit that the record in this case fails utterly to show that the petitioner has been by the State of Florida denied equal protection or due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

It is, therefore, respectfully urged that the Order and Judgment of the Supreme Court of Florida be affirmed.

Respectfully submitted,

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